IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1899.

No. 242.

C. W. SMITH, as Receiver of the Atlantic & Pacific Railroad Company,
Plaintiff in Error,
vs.
TRUMAN REEVES, as Treasurer of the State of California,
Defendant in Error.

REPLY BRIEF.

In reply to the argument made by the Attorney General, (in his brief for defendant in error) in support of the proposition that the United States Circuit Court could not entertain jurisdiction of this cause, by reason of the prohibition contained in the 11th amendment of the constitution of the United States, we have to say:

FIRST.

The Atlantic & Pacific Railroad Company was created by an act of Congress (approved July 27, 1866) "for national purposes and to serve national ends." (California v. C. P. Ry. Co., U. S. 1), and is and was not a citizen of another

state, or a citizen or a subject of any foreign state, and is not within the letter, or even the spirit, of the 11th amendment of the constitution of the United States.

The only provision of the constitution of the United States applicable to the case under consideration, is that portion of section 2, article 3, which says:

"The judicial power shall extend to all causes in law and equity arising under this constitution, the laws of the United States and treaties made or which shall be made under their authority * * * the controversies between a state and citizens of another state * * * ."

The modification of this provision created by the adoption of the 11th amendment, reading as follows: "The judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state," did not affect the right of a federal corporation to invoke the aid of a federal court for the enforcement of its rights therein.

If the modification contained in the 11th amendment does not affect the Atlantic & Pacific Railroad Company, it could not affect the receivers of it, as such receivers stood exactly in the same position that the Atlantic & Pacific Railroad Company was in, itself, relative to any of its rights.

T. & P. R. R. Co. v. Cox, 145 U. S.. 593.
McNulta v. Lochridge, 141 U. S., 327.

Again, the receivers brought this suit as officers of the Circuit Court of the United States, having the right to proceed in the court of their appointment, regardless of citizenship or anything else.

Porter v. Sabin, 149 U. S., 473.
White v. Ewing, 159 U. S., 36.

As officers of the court they were not within the inhibition of the 11th amendment.

SECOND.

The State of California, by the adoption of section 3669 of the Political Code (quoted in original brief of plaintiff in error, page 11, and in brief of defendant in error, page 2,) attempted to inaugurate the policy of compelling everyone whose property was assessed by the state board of equalization to pay to the state treasurer all the taxes levied upon such assessment for state, county, city and other municipal purposes, regardless of any or all claims that such taxes were illegal. The state said, by the provisions of this section, to all: However illegal the taxes levied and sought to be collected are, you must pay the same over to the state treasurer, without contest, and then the state gives you this remedy, by which you can test the question of the legality of the taxes and recover the same back, if such taxes or any portion thereof are determined by the courts to be illegal. This statute recognized, and was based upon the principle determined by this court in the case of Erskine v. Van Aisdale, 15 Wall., 75,) in which the court says:

"Taxes illegally assessed and paid may always be recovered back if the collector understands from the payer that taxes are illegal, and that suit will be instituted to recover them."

This statute requires as the conditions thereof that such suit must be brought not later than the first Monday in June, following the year the taxes are due, the tax payer having first notified the state comptroller of an intention to bring the action. While the state treasurer, by force of the statute, must collect all taxes, including even those that are absolutely illegal, and which he officially has no right to collect, yet as to illegal taxes collected by force of this statute, he must be considered in the position of a public trustee who holds the money thus illegally collected, not for the state or

any of its municipalities, but in trust for the owner thereof. Even if this be not correct he does not collect or hold taxes collected upon such assessments, for the state alone, because he collects and holds such taxes for the counties and municipalities as well, and, therefore, a suit against him in his official capacity is, in fact, a suit against a statutory trustee of funds, and in such capacity he, the state treasurer, does not represent the state, in an action like the present one to recover a sum of money which he as state treasurer had neither the right to collect or hold after collection for anyone but the owner. The suit stands upon precisely the same footing as it would stand upon if this suit was against him as an officer who had forcibly collected illegal taxes by a seizure of the property assessed. The purpose of the statute was for the protection of the officer, in case of the collecting of illegal taxes by him so as to relieve him from the responsibility of collecting them by force where a levy would require him so to do. This statute cannot have the effect of placing him in any better position than he would be placed in if he had forcibly seized property belonging to the tax payer and sold it for the purpose of procuring money sufficient to satisfy the illegal levy, except that the measure of damages is fixed at the amount of taxes actually collected. In the case of the collection of illegal taxes by an officer of the state through seizure of property, this court, by an unbroken line of decisions, has held that the officer does not represent the state, and may be sued by the injured party to recover damages for the wrong done. It surely cannot be contended that a statute like the one under consideration which compels the payment of a levy of taxes, though such levy is illegal by giving the right to litigate afterwards the question of the legality thereof, places the tax payer in a worse position than he would be placed in if, in-

stead of paying the taxes in the manner required by the statute, such taxpayer forced the officer to a seizure and sale of his property in order to collect. As was said by the chief justice of this court, speaking for the court, in Exparte Tyler (149 U. S., 163), in summarizing the views heretofore expressed by the court in similar cases:

"The object of this petition was, we repeat, to protect the property, but even if it were regarded as a plenary bill in equity properly brought for the purpose of testing the legality of the tax, we ought to add that in our judgment it would not be obnoxious to the objection of being a suit against the state. It is unnecessary to re-travel the ground so often traversed by this court in exposition and application of the 11th amendment. The subject was but recently considered in Pennoyer v. McConnaughy, 140 U. S., 1, in which Mr. Justice Lamar, delivering the opinion of the court, cites and reviews a large number of cases. The result was correctly stated to be that where a suit is brought against defendants who claim to act as officers of a state, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the state, or for compensation for damages, in a proper case, for an injunction to prevent such wrong and injury; or for a mandamus in a like case to enforce the performance of a plain legal duty, purely ministerial; such suit is not, within the meaning of the amendment, an action against the state.

And while it was conceded that the principle stated by Chief Justice Marshall in the leading case of Osborn v. Bank of United States 22 U. S., 9 Wheat 738, that 'in all cases where jurisdiction depends on the party, it is the party named in the record,' and that 'the 11th amendment is limited to those suits in which a state is a party to the record,' had been qualified to a certain degree in some of the subsequent decisions of this court; yet it was also rightly declared that the general doctrine there announced that the curcuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the state, when to execute it would be to violate rights and privileges of the complainant that had been guaranteed by the constitution and would do irreparable damage and injury to him, has never been departed from.

The views expressed in United States v. Lee, 106 U. S., 196; New Hampshire v. Louisiana, 108 U. S., 76; Re Ayers, 123 U. S., 443; Hans v. Louisiana, 134 U. S., 1; McGahey v. Virginia, 135 U. S., 662, and numerous other cases render further discussion unnecessary."

THIRD.

It has been distinctly and repeatedly held by this court that "an immunity from suit belonging to a state which is protected by the constitution, is a personal privilege which it may waive at pleasure."

Beers v. Arkansas, 20 How., 527;
Re Ayers, 123 U. S., 443;
Hans v. Louisiana, 134 U. S., 1;
Clark v. Barnard, 108 U. S., 436.

While it is true that a state when consenting to be sued may base such consent upon such conditions as it may choose to make and such conditions have to be observed, yet it cannot make, as one of such conditions, a condition that it can only be sued in its own courts upon a right of action given to all.

There are no conditions imposed by section 3669 of the Political Code, excepting, 1st: That notice shall be first given to the comptroller of an intention to bring suit; and, 2nd: That suit must be commenced before the first Monday in June of the year succeeding the year in which the taxes were levied. The privilege granted by the statute, to the treasurer, that he, at the time of demurring or answering the complaint, may demand that the action be tried in the superior court of the county of Sacramento, cannot and could not be regarded as valid, to the extent of preventing suit from being

brought in the federal court by a party who had the right to appeal to that court for the assertion of a statutory right or remedy. We quote the third and fourth points of the syllabi, in the case of Ry. Co. v. Whitten (13 Wall., 271) as much in point upon this question:

"3. A statute of Wisconsin provides that 'whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured; *provided that such action shall be brought for a death caused in this state, and in some court established by the constitution and laws of the same.*' *Held* that the provision requiring the action to be brought in a court of the state, does not prevent a non-resident plaintiff from removing the action, under the act of congress of March 2nd, 1867, to a federal court, and maintaining it there.

4. Whenever a general rule as to property or personal rights or injuries to either, is established by state legislation, its enforcement by a federal court in a case between proper parties is a matter of course, and the jurisdiction of the court in such case is not subject to state limitation."

We quote at length from the opinion of Justice Harlan, in the case of Smith v. Ames (169 U. S., 476), cited in our original brief, as follows.

"We cannot accept this view of the equity jurisdiction of the circuit courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a federal court is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in the federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court, and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. It is true that an enlargement of equitable rights

arising from the statutes of a state may be administered by the circuit courts of the United States. Case of Broderick's Will (Keiley v. McGlynn), 88 U. S., 21, Wall. 503, 520; Holland v. Challen, 110 U. S., 15, 24; Dick v. Foraker, 155 U. S., 404, 415; Bardon v. Land and River Improv. Co., 157 U. S., 327, 330; Rich v. Braxton, 158 U. S., 375, 405. But if the case in its essence be one cognizable in equity, the plaintiff, the required value being in dispute, may invoke the equity powers of the proper circuit court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of federal jurisdiction. Payne v. Hook, 74 U. S., 7 Wall., 425, 430; McConihay v. Wright, 121 U. S., 201, 205. A party, by going into a national court, does not, this court has said, lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality; that the wise policy of the constitution gives him a choice of tribunals. Davis v. Gray, 83 U. S., 16 Wall., 201, 221; Cowley v. Northern Pacific Railroad Co., 159 U. S., 569, 583. So, wherever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers to suits for redress in its own courts.' Reagan v. Farmers' Loan & Trust Co. (No. 1), 154 U. S., 362, 391; Mississippi Mills v. Cohn, 150 U. S., 202, 204, Cowles v. Mercer County, 74 U. S., 7 Wall., 118; Lincoln County v. Luning, 133 U. S., 529; Scott v. Neely, 140 U. S., 106; Chicot County v. Sherwood, 148 U. S., 529; Cates v. Allen, 149 U. S., 451."

The point made by the attorney general (top of page 9 of his brief), that the provisions of the Code of Civil Procedure relating to pleadings, proofs, trial and appeal, are conditions upon which actions may be brought under the provisions of section 3669 of the Political Code, has no force because of the fact that, by section 914 of the Revised Statutes of the United States, proceedings "in civil cases other than in equity and admiralty cases in the circuit and district courts are required to conform, as

near as may be, to the practice, pleadings and forms and mode of procedure existing at the time in like cases in the courts of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

All of which is respectfully submitted.

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